

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRACY J. INGRAM

Claimant

VS.

MCANANY CONSTRUCTION, INC.

Respondent

AND

BUILDERS' ASSOCIATION SELF-INSURERS' FUND

Insurance Carrier

Docket No. 228,776

ORDER

Respondent appealed the preliminary hearing Order entered by Administrative Law Judge Julie A. N. Sample on February 24, 1998.

ISSUES

Respondent requested Appeals Board review of the following issues:

- (1) Did claimant suffer an accidental injury on November 12, 1997, that arose out of and in the course of his employment with respondent?
- (2) Did the Administrative Law Judge err by ordering respondent to pay claimant temporary total disability benefits without a physician's opinion that claimant was unable to work?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The first issue raised by the respondent grants the Appeals Board jurisdiction to review this preliminary hearing Order. See K.S.A. 1997 Supp. 44-534a.

(1) The Administrative Law Judge granted claimant's request for temporary total disability benefits, finding claimant had proved he suffered an accidental injury while working for the respondent on November 12, 1997. Respondent contends the claimant failed to prove his low-back injury resulted from an accident at work.

Claimant testified he was working for respondent on November 12, 1997, performing some asphalt patch work at a mall located in Overland Park, Kansas. At approximately 12 noon on that day, claimant testified he and another employee lifted a machine, identified as a "wacker," which was required to complete the asphalt patching job, out of the back of a company truck. The "wacker" machine was awkward, and claimant had to twist his body and move his feet in order to set the "wacker" on the ground. Claimant testified he did not notice any low-back symptoms at that time and he was able to work the remainder of the shortened work day which concluded at about 2:00 p.m.

The next morning, however, claimant testified he had stiffness and symptoms in his low back. He telephoned the respondent's owner and told him he needed the day off. However, the respondent's owner later returned his call and told claimant he was needed on a job that afternoon. Claimant testified he drove to the job but could not work because his symptoms had worsened to the point that he could hardly walk. After claimant left this job site, he sought medical treatment for his severe low-back pain at Olathe Medical Center Emergency Department. The Olathe Medical Center emergency record does not contain history from claimant that he injured his back lifting at work. Claimant, however, testified that he had related to the emergency room doctor he had lifted the awkward "wacker" machine the day before at work.

The emergency room physician diagnosed claimant with back pain and radiculopathy. The doctor then scheduled claimant for an MRI examination the next day. Claimant testified the MRI showed a herniated disc, and claimant was referred for further medical treatment to a neurologist.

Claimant testified he underwent surgery on January 5, 1998, in an effort to relieve his low-back pain and left leg radiculopathy. At the February 23, 1998, preliminary hearing, claimant testified his symptoms had improved and he was currently in a physical therapy program. Claimant remained under the treatment of a physician and had not been released to return to work.

Claimant acknowledged he had prior low-back problems and had been treated for those problems by a chiropractor as recently as October 31, 1997. Nevertheless, claimant testified he had not been involved in any type of recent physical activity that could have caused his present low-back complaints other than the lifting of the "wacker" machine at work on November 12, 1997.

Respondent argues claimant has failed to prove his low-back problem is related to his employment. The medical records of Dr. Ellis, chiropractor, were admitted into evidence at the preliminary hearing and showed he treated claimant for low-back problems dating

back to 1995. Claimant also was treated as recent as October 31, 1997, for low-back complaints. Dr. Ellis's medical records do not relate claimant's back pain to his work. The respondent asserts the preliminary hearing record does not prove that claimant's lifting of the "wacker" machine at work had a causal relationship to claimant's herniated disc and subsequent surgery. Respondent argues the better explanation for claimant's low-back injury is the natural worsening of a preexisting condition.

Although by the narrowest of margins, the Appeals Board finds the Administrative Law Judge's conclusion that claimant's low-back injury is related to the lifting of the "wacker" machine at work on November 12, 1998, should be affirmed. The Appeals Board finds this conclusion is supported on the most part by claimant's in person testimony before the Administrative Law Judge who had the opportunity to assess claimant's credibility.

(2) The respondent also questions the Administrative Law Judge's Order requiring the respondent to pay claimant temporary total disability benefits. Respondent asserts the preliminary hearing record contains no proof that claimant was temporarily and totally disabled at any time from engaging in substantial gainful employment.

The Appeals Board has had the opportunity on numerous other occasions to address the issue of whether it has jurisdiction to review an Administrative Law Judge's preliminary hearing Order that grants or denies requests for temporary total disability compensation. The preliminary hearing statute, K.S.A. 1997 Supp. 44-534a(a)(2), specifically authorizes the Administrative Law Judge to grant or deny temporary total disability compensation or medical compensation pending the full hearing on the matter. The Appeals Board finds, at this juncture of the proceeding, the Administrative Law Judge did not exceed her jurisdiction when she granted claimant's request for temporary total disability compensation.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated February 28, 1998, entered by Administrative Law Judge Julie A. N. Sample, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

c: Mark A. Corder, Olathe, KS
Wade A. Dorothy, Lenexa, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director